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Supreme Court of the United States

No. [redacted] 135

MOVIECOLOR LIMITED,

Petitioner,

against

EASTMAN KODAK COMPANY, TECHNICOLOR, INC. and TECHNICOLOR MOTION PICTURE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS TECHNICOLOR, INC. AND TECHNICOLOR MOTION PICTURE CORPORATION IN OPPOSITION

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Supreme Court of the United States

No. 1021

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Statement of the Case

One assertion made by petitioner in its Statement of the Case deserves correction, since it has some relevance to the inadequacies of the complaint in raising the fraudulent concealment doctrine which petitioner relied upon in the Courts below. Contrary to the assertion (Petition, p. 7) that "On February 3, 1955, when the facts alleged in the complaint came to light, it [petitioner] was restored to the Register * * *" there is no allegation in the complaint, in the cited paragraph 39 or elsewhere, that the "facts came to light" in 1955. Petitioner cannot, of course, supply a lack of allegations of discovery of the supposed fraud it

relies on to toll the Statute of Limitations by inference unsupported in the record.

The brief filed by respondent Eastman Kodak sets forth the question presented and the essential facts and circumstances. To avoid needless repetition, these respondents will not repeat the statements made in that brief.

Argument

Stripped of the language aimed at conformance with this Court's Rule 19, petitioner's argument for issuance of the writ in this case comes down to this—the Court of Appeals wrongly decided that, in the circumstances, petitioner's last-minute application for leave to amend a complaint alleging a thirty-year old antitrust claim should be denied, notwithstanding the Court-recognized freedom of discretion to allow amendment expressed in Rule 15(a), Federal Rules of Civil Procedure. The only decision of which petitioner complains consists, therefore, of an exercise of discretion by the Court of Appeals in light of the particular facts and circumstances of this case. That decision neither "conflicts" with decisions of other courts of appeals nor does it decide an important question of federal law. The decision results in disappointment to the particular litigant; but this Court's jurisdiction and this Court's time hardly should be devoted to the assuagement of the disappointments of numberless losing litigants in the appellate courts of the federal circuits and the states.

Petitioner's reliance on a point decided in its favor by the Court of Appeals as a basis for the grant of certiorari is on its face ill-founded; in any event, there is concededly no conflict among the courts of appeals on the question concerning which the court below expounded in dictum.

I

No "standards" for application of Rule 15(a) were involved in the decision by the Court of Appeals.

In deciding this case against the petitioner, the Court of Appeals analyzed the complaint in detail and came to the inescapable conclusion that the facts pertinent to the conspiracy purportedly injuring plaintiff alleged in the complaint did not at all involve acts of concealment, and that the complaint was "inconsistent with any view either that plaintiff did not know of its injury in signing away its rights to the Keller-Dorian process" or "that it did not know of the actions of the defendants and of French and American Keller-Dorian that led up to that" (App. A to Petition, p. 28).

In short, the conspiratorial acts alleged by petitioner, in the form alleged, were quite overt and apparent. To invoke a doctrine of fraudulent concealment, petitioner would have to allege entirely new and different facts. Although given ample opportunity to indicate to the Court of Appeals whether such facts existed, petitioner failed to hint even generally what additional allegations it could make. In this posture of the case, it would have been a vain act productive of further delay before this 30-year old claim was laid to rest, had the Court nonetheless given petitioner leave to amend under its discretionary power.

Petitioner would have this Court believe that the Court of Appeals held it "obligated to propose a proposed amendment" (Petition, page 12). To the contrary, the Court of Appeals understandably sought some indication from the petitioner as to the nature of an amendment to the carefully-drawn complaint, where that complaint

appeared to be inconsistent with any "fraudulent concealment" which could toll the Statute of Limitations. In view of the obvious Statute of Limitations question posed by the complaint, petitioner cannot claim to be surprised by the requirement to let it be known what facts could be relied on to support its own chosen exception to the running of the Statute. Surely petitioner does not contend that the Court of Appeals cannot seek guidance in the exercise of its discretion in granting leave to amend from the party seeking to amend.

The cases cited by petitioner (Petition, p. 11) in attempting to create a flavor of conflict and variation of decisions among and within the circuits do not really present any questions relevant to this case at all.

McNaughton v. *New York Central Railroad Company*, 220 F. 2d 835 (7th Cir. 1955) was a negligence case in which defendant proposed a specific amendment to its answer tendering the additional defense of settlement. There was nothing in defendant's own answer which conflicted with this additional defense. The trial court had denied leave to amend on the basis of plaintiff's verified objections. The Court of Appeals rightly held this to be an inappropriate denial under Rule 15(a). In this case, of course, plaintiff has not indicated what additional facts can be relied on; and its own complaint negates the theory on which it claims exception to the obvious Statute of Limitations defense presented by its pleading.

Armstrong Cork Co. v. *Patterson-Sargent Co.*, 10 F.R.D. 534 (N. D. Ohio, E.D., 1950) and *A. L. B. Theatre Corporation* v. *Loew's Incorporated*, 21 F.R.D. 584 (N. D. Ill. 1957), the other cases in the 7th Circuit cited on page 11 of the Petition, both preface decisions as to specific tendered amendments by stating in substance that a motion under Rule 15(a) is addressed to the sound discretion of the Court, that other decisions under that Rule are merely

advisory and that each case must rest on its particular facts. These cases certainly reveal little conflict in the general "standards" implicit in Rule 15(a).

In *Gallon* v. *Lloyd-Thomas Company*, 264 F. 2d 821 (8th Cir. 1959), the Court was presented with a question under Rule 15(b) pertaining to amendment of pleadings to conform to proof, and simply found that the proof had not presented the issue pleaded in the proffered amendment. *Dumbrovskis* v. *Murff*, 24 F.R.D. 302 (S. D. N. Y. 1959), granted plaintiffs leave to amend their complaints, and in passing noted that discretionary power would be liberally exercised where there was "no question of bad faith or delay on the part of the movants," and no prejudice to the opposing party. This seems not at odds with the cases cited by petitioner in the 7th Circuit, *supra*.

As to cases regarding delay alone as a ground for denial of leave to amend cited at page 11 of the petition, they are without relevance to the instant case, since the decision of the Court of Appeals did not rest upon this ground (Appendix A to Petition, p. 30).

In short, the several cases cited by Petitioner as indicating a conflict in application of Rule 15(a) simply indicate that each case stands on the facts presented, and that even if conflict in decision exists this case will not resolve it.

Taken all in all, the Court of Appeals simply exercised its discretion, in cognizance of Rule 15(a), in a sound and careful manner. Its decision was peculiar to this case and could not elicit or change the standards bearing on Rule 15(a). Grant of certiorari here would serve no purpose beyond general review of the unanimous decision of an appellate court on this narrow question of discretion. That petitioner disagrees with this sound exercise of discretion by the Court of Appeals is, of course, no ground for the grant of certiorari.

II

No question of the application of the federal equitable tolling doctrine is before this Court.

Notwithstanding the elementary proposition that this Court does not render advisory opinions, petitioner seeks, in its argument (Petition, pp. 13-15) to base its request for certiorari in part upon the assumed importance of a dictum of the Court of Appeals which agreed with petitioner's view. This dictum, pronounced so that the District Courts of the Second Circuit would have the benefit of the views of the Court of Appeals arrived at after the issue had been "fully argued", announced the view that the equitable tolling doctrine set forth in *Bailey* v. *Glover*, 88 U. S. 342, 21 Wall. 342 (1847) and *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946), applies in a proper case to toll the running of a state statute of limitations in an action at law to enforce a federally-created right. Although this dictum had the salutary effect of resolving a then-existing conflict in decisions of the District Court for the Southern District of New York, it was not in conflict with decisions of other Circuits, as petitioner appears to concede (Petition, p. 13).

The result is, first, that given a proper case where the doctrine would be applicable, the Second Circuit courts will apparently apply the *Bailey-Holmberg* doctrine in treble damage actions at law; second, that no other court of appeals has held to the contrary. Thus, there is no conflict of decisions calling for resolution. Indeed, there is in this case no "decision" at all as to the point which petitioner raises in its argument on pages 13-15 of the Petition. Petitioner apparently recognized that this

ground for granting certiorari was totally lacking in substance, because it did not even state it as one of the "Questions Presented" (Petition, p. 2). Since under Rule 23(c) of this Court only questions fairly presented will be considered, this portion of petitioner's argument appears to be irrelevant.

CONCLUSION

The discretion of the Court of Appeals was properly exercised after full and careful consideration of the facts and the applicable law, nothing beyond the particulars of this case is here involved, and this petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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June 30, 1961.